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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

April 24, 1997

Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Expedited Reconsideration of Commission's Interpretation of Section 272(e)(4)
CC Docket No. 96-149

Dear Mr. Caton:

Enclosed for filing in this docket are the original and four copies of the Bell Company Reply Comments on Expedited Reconsideration of Interpretation of Section 272(e)(4). Please date-stamp and return the extra copy in the enclosed envelope.

We are also sending a copy of these comments to Janice Myles of the Common Carrier Bureau and to ITS, Inc., as directed in the Commission's Public Notice of April 3, 1997.

If you have any questions concerning this matter, please contact me at (202) 326-7900.

Sincerely,

Mark L. Evans

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	CC Docket No. 96-149

BELL COMPANY REPLY COMMENTS ON EXPEDITED RECONSIDERATION OF INTERPRETATION OF SECTION 272(e)(4)

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April 17, 1997

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	CC Docket No. 96-149

BELL COMPANY[1] REPLY COMMENTS ON EXPEDITED RECONSIDERATION OF INTERPRETATION OF SECTION 272(e)(4)

No party has provided a plausible justification for ignoring the unambiguous terms of section 272(e)(4). Congress expressly provided, in language neither obscure nor equivocal, that a Bell operating company "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate," so long as such facilities or services are made available to other carriers on the same terms and conditions and so long as costs are appropriately allocated. The long-distance incumbents nonetheless ask the Commission to "interpret" this straightforward provision to prohibit what its words plainly permit.

There is no textual foundation for this brazen effort to nullify the congressional directive. Nor can the Commission expect the courts to defer to an application of the statute that departs from its clear terms. "Under Chevron, the Court must first consider the plain meaning of the Act. Where, as here, [the statute's] meaning is clear, the Court can give no deference to the [agency's]

[1] These Reply Comments are submitted on behalf of the Bell Atlantic Telephone Companies, Bell Atlantic Communications, Inc., BellSouth Corporation, NYNEX Corporation, SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell.

contrary conclusions." Hammontree v. NLRB, 894 F.2d 438, 441 (D. C. Cir. 1990). See also MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2231 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear").

I. THE STATUTE CANNOT BE READ TO FORECLOSE WHAT SECTION 272(e)(4) EXPRESSLY PERMITS

The long-distance incumbents' principal argument is that sections 271(a) and 272(a) "categorically prohibit a BOC, even after its section 271 application is granted, from itself originating any interLATA services other than out-of-region services, most incidental services, and previously authorized services." AT&T Br. 5. Section 272(e)(4), in their view, is merely "a conventional non-discrimination provision" that "establishes the conditions under which [these otherwise] authorized services may be provided to an interLATA affiliate." Id. But this theory both misreads sections 271(a) and 272(a) and flatly rewrites section 272(e)(4).

First, section 271(a) has no bearing on the issue here. As we explained in our initial comments, section 271(a) requires a BOC or its affiliate to obtain FCC approval under section 271(d) before providing interLATA services originating in any of its in-region States. We make no claim here that section 272(e)(4) overrides that threshold requirement.[2] Once the FCC has granted such approval, however, section 271(a) is fully satisfied and has no role in determining whether the BOC may provide authorized interLATA services to its affiliate. For the answer to that question, one must turn to section 272.

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[2] Nor does our theory imply that section 272(e)(4) "override[s] the requirements of section 271." AT&T Br. 3. As we explained in our opening comments, section 271(a) bars a BOC or its affiliate from providing interLATA services "except as provided in [section 271]." Section 272(e)(4) is not "in" section 271 and therefore cannot qualify as an exception to that bar.

Second, contrary to the IXCs' assertion, section 272(a) does not "categorically prohibit" a BOC, after receiving section 271 approval, from providing in-region interLATA services itself. What the provision actually says is that "[a] Bell operating company . . . may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates." 47 U.S.C. § 272(a)(1) (emphasis added). The word "it" in this provision can refer only to the "Bell operating company." By its plain terms, therefore, section 272(a) expressly allows a BOC itself to provide in-region interLATA services, so long as it does so "through" an affiliate that meets the requirements of subsection (b). And, as we noted in our initial comments, a natural way for a BOC to provide interLATA service "through" its affiliate is to provide the underlying interLATA service and facilities "to" the affiliate. Consequently, nothing in section 272(a) "prohibits" what section 272(e)(4) expressly permits.

The parties debate at some length whether "origination" of interLATA calls, as that term is used in section 272(a)(2)(B), denotes a service provided to end-users, as we have argued, or can be read more broadly to include services provided to an affiliate or other carriers, as the IXCs claim.[3] Although we believe that our view of "origination" is the only sensible one in the context

[3] There is no merit to the IXCs' claim that, under our view of the term "origination," a BOC's provision of interLATA services to its affiliate "would not be covered by section 271(b) and would be prohibited by section 271(a) even after Commission approval." AT&T Br. 4. The argument ignores important differences between section 271(b) and section 272(a). Section 271(b)(1) states that, with FCC approval, a BOC "may provide interLATA services originating in any of its in-region States." It does not say, as the IXCs' argument presupposes, that a BOC "may originate interLATA services in any of its in-region States." As we explained in our initial comments, the term "originating" serves only to identify the geographic location in which customers initiate an interLATA call. See § 271(b)(2) (providing a different rule for "services originating outside [a BOC's] in-region States"). Section 272(a), by contrast, provides that a BOC, once it receives section 271 approval, may provide in-region "origination of interLATA telecommunications services" only through a separate affiliate. The term "origination" as used in section 272(a) refers to the specific activity of providing interLATA services to customers who

of section 272, the issue is largely beside the point. Under either reading, section 272(a)(1) plainly allows a BOC itself to provide "origination" of interLATA service if it does so "through" its interLATA affiliate. A BOC's provision of interLATA services "to" its affiliate under section 272(e)(4) is thus wholly compatible with its "origination" of such services "through" its affiliate under section 272(a)(1), and that is so regardless of which view of "origination" is deemed correct.

Third, the IXCs' theory would require radical surgery to section 272(e)(4). In place of the existing language — under which a BOC "may" provide "any" interLATA services or facilities to its affiliate "if" it satisfies the non-discrimination and cost-allocation requirements — the IXCs would recast the provision to say that a BOC "shall not" provide "the specific interLATA services enumerated in sections 271(b)(2), 271(f), and 271(g)" to its affiliate "unless" it satisfies the non-discrimination and cost-allocation requirements. But the FCC has no power to indulge in such "a fundamental revision of the statute." MCI Telecommunications Corp. v. AT&T, 114 S. Ct. at 2232. The Commission must scrupulously apply the words actually enacted by Congress. "May" means "may," not "shall not." "Any" means "any," not a narrow subset of "any." The IXCs' view simply cannot be squared with the language or structure of the Act.

This rewrite of section 272(e)(4), moreover, would render the provision essentially superfluous. Section 272(c) already does the work of a "conventional non-discrimination provision." AT&T Br. 5. It provides that, in dealings with its interLATA affiliate, a BOC "may not discriminate" between the affiliate and any other entity "in the provision or procurement of

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initiate interLATA calls. Our reading of "origination" in section 272(a) thus has no effect on the proper understanding of the term "originating" in section 271(b)(1).

goods, services, facilities, and information," and it "shall account for all transactions . . . in accordance with accounting principles designated or approved by the Commission." Under the IXCs' constricted view of the provision, section 272(e)(4) adds nothing of substance to section 272(c). Their theory thus contravenes the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)); accord United States v. Nordic Village Inc., 503 U.S. 30, 35-36 (1992) (statute must be interpreted to attach "practical consequences" to each section).

II. APPLYING SECTION 272(e)(4) IN ACCORDANCE WITH ITS PLAIN TERMS DOES NOT DIMINISH THE SEPARATE AFFILIATE SAFEGUARDS

The long-distance incumbents assert that giving effect to the language of section 272(e)(4) would "turn the separate affiliate requirement into a farce." AT&T Br. 10. That is so, in their view, because "[t]here would be nothing left for the separate affiliate to do." Id.

As a factual matter, the IXCs are simply mistaken. The interLATA affiliate will have responsibility for determining what services it will offer, to what customers, and at what price, and for managing the interLATA services it chooses to provide. In this respect, it will perform the same functions that the members of the Telecommunications Resellers Association perform when they offer an interLATA service over AT&T's interLATA network.

More fundamentally, the IXCs ask the wrong question. The issue is not how many functions are performed by the interLATA affiliate, but whether the existence of a separate interLATA affiliate provides additional safeguards, over and above those already in place, as Congress intended. As we pointed out in our initial comments, and as the Commission again

recently explained, the structural separation provisions of section 272 add a layer of protection against discrimination and cross-subsidy by barring a BOC and its interLATA affiliate from jointly owning interLATA facilities, by requiring the affiliate to obtain any interLATA facilities or services from the BOC on an arm's-length basis, and by requiring the BOC and the affiliate to reduce all transactions between them to writing and to make such writings available for public inspection. 47 U.S.C. § 272(b). Regardless of which functions are performed by the BOC and which are performed by the affiliate, these separation requirements "increas[e] the transparency of transactions between a BOC and its affiliates" and "ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive."[4] That is equally true with respect to interLATA services and facilities provided by the BOC to its interLATA affiliate.

Section 272 also provides added protection against cross-subsidy, because a BOC cannot subsidize services for the benefit of its affiliate without also subsidizing services provided on non-discriminatory terms to the affiliate's competitors. See Affidavit of William E. Taylor ¶ 21 (attached to Bell Company Comments). As the Commission accordingly has concluded, the section 272 safeguards — by requiring a BOC to conduct any transactions with its interLATA affiliate on an arm's-length, non-discriminatory basis — "will constrain a BOC's ability to

[4] Second Report and Order in CC Docket No. 96-149 and Third Report and Order in Docket No. 96-61, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, FCC 97-142, ¶ 116 (rel. Apr. 18, 1997) (internal quotations omitted) ("LEC Non-Dominance Order").

allocate costs improperly and make it easier to detect any improper allocation of costs that may occur."[5]

The long-distance carriers wrongly assert that BOC employees will "design and engineer a long-distance network customized to their affiliate's business strategies" and that such "joint activity would be the essence of discrimination." AT&T Br. 8; see also MCI Br. 11-12. The argument rests on a false premise. The Commission has already made clear in this proceeding that, "to the extent a BOC develops new services for or with its section 272 affiliate, it must develop new services for or with unaffiliated entities in the same manner." First Report and Order ¶ 210. In other words, if a BOC were to design "customized" services at the request of its interLATA affiliate — something that no BOC has said it plans to do — it would have to offer other carriers the same opportunity to request "customized" services on the same terms and conditions. If a BOC were nonetheless to "engage in strategic behavior to benefit its section 272 affiliate" — which is precisely what the IXCs claim will happen — "such action may not only violate section 272(c)(1), but would also violate section 201(a) of the Act." Id. ¶ 211. There is no basis for the IXCs' rank speculation that, despite the Commission's clear statements, BOCs will violate their express obligations under the statute.[6]

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[5] LEC Non-Dominance Order ¶ 105; see also id. ¶ 106 ("We further find that price cap regulation of the BOCs' access services reduces the BOCs' incentive to allocate improperly the costs of their affiliates' interLATA services."); id. ¶ 107 ("Furthermore, even if a BOC were able to allocate improperly the costs of its affilate's interLATA services, we conclude that it is unlikely that a BOC interLATA affiliate could engage successfully in predation.").

[6] See LEC Non-Dominance Order ¶¶ 117-18 (describing the Commission's enforcement mechanisms).

Nor is there any substance to the suggestion that BOCs acting alone will design "customized" services for their affiliates that other carriers will have no use for. If a BOC designs and offers an efficient interLATA service that its affiliate finds useful, other carriers — including interexchange resellers and wireless carriers — will almost certainly find the same service useful. As Omnipoint stated in its comments, the availability of interLATA services and facilities from a BOC "would promote efficient interconnection among carriers" and "would further competition and cost-based pricing of services to the public." Omnipoint Br. 3.

Finally, it is nonsensical to argue that a BOC's offering of such services or facilities "would be patently discriminatory" merely because some carriers with their own interLATA facilities may have no interest in obtaining the services or facilities from the BOC. AT&T Br. 8 n.6. Only a handful of interLATA carriers operate their own interLATA facilities. Most are resellers whose customers stand to benefit significantly from the additional facilities-based competition that a BOC will provide. Whether the BOC's facilities-based service is discriminatory cannot possibly depend on whether some other facilities-based carrier chooses to purchase the service. What matters is that the service is offered to all other carriers on the same terms and conditions provided to the BOC's affiliate.

Respectfully submitted,

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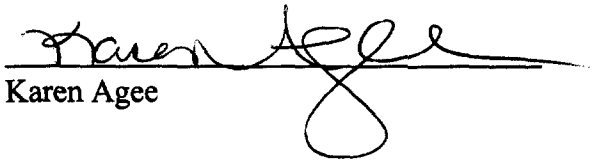
April 24, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 1997, a copy of the foregoing BELL COMPANY REPLY COMMENTS ON EXPEDITED RECONSIDERATION OF INTERPRETATION OF SECTION 272(e)(4) was served by U.S. mail, first class, postage prepaid or via hand delivery upon the parties on the attached service list.



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